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# Parents Involved in Community Schools v. Seattle School District No.1: The Application of Strict Scrutiny to Race-Conscious Student Assignment Policies in K-12 Public Schools

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**PARENTS INVOLVED IN COMMUNITY SCHOOLS  
v. SEATTLE SCHOOL DISTRICT NO. 1: THE  
APPLICATION OF STRICT SCRUTINY TO  
RACE-CONSCIOUS STUDENT ASSIGNMENT  
POLICIES IN K-12 PUBLIC SCHOOLS**

NICOLE LOVE\*

**Abstract:** Schools nationwide have used race-conscious student assignment policies to combat the resegregation of K-12 public schools. However, the Court in *Parents Involved in Community Schools v. Seattle School District No. 1* dealt a disheartening blow to school districts concerned about their racial diversity, holding that certain race-conscious student assignment policies violated the Equal Protection Clause of the Fourteenth Amendment. The Court applied strict scrutiny in reaching this conclusion, contrary to the original intent of the drafters of the Fourteenth Amendment and the Court's jurisprudence in desegregation cases. This Note examines the relationship between segregation, desegregation, and resegregation in America's public schools and the Fourteenth Amendment. This Note argues that the Court erred in analyzing the race-conscious assignment policies under strict scrutiny for two reasons. First, the drafters of the Fourteenth Amendment did not intend for the Amendment to be "color-blind." Second, race-conscious assignment policies should be analyzed as an extension of the Court's desegregation jurisprudence, not as an extension of the Court's affirmative action jurisprudence.

INTRODUCTION

Each autumn, children across the country prepare for a new school year. They gather their books, grab their lunch bags, and wave goodbye to summer as they head off to school. In Jefferson County, Kentucky, Joshua McDonald was preparing for his first day of kindergarten.<sup>1</sup> Joshua and his mother Crystal Meredith had just moved into a

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\* Comment Editor, BOSTON COLLEGE THIRD WORLD LAW JOURNAL (2008-2009)

<sup>1</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2750 (2007).

new school district and missed the assignment period.<sup>2</sup> Joshua was assigned to attend Young Elementary, but Ms. Meredith tried to transfer him to Bloom Elementary, located much closer to their home.<sup>3</sup>

There was space available at Bloom, but her request for transfer was denied.<sup>4</sup> The school's policy on assignments was based first on the availability of spaces and then on racial guidelines.<sup>5</sup> "If a school has reached the 'extremes of the racial guidelines,' a student whose race would contribute to the school's racial imbalance will not be assigned there."<sup>6</sup> Bloom had reached the extremes.<sup>7</sup> Ms. Meredith received a letter stating that "[t]he office of student services disapproved the transfer request" because of its "adverse effect on desegregation compliance."<sup>8</sup> Joshua was not permitted to attend Bloom because of his race.<sup>9</sup> The year was 2002.<sup>10</sup>

Similarly, across the country in Seattle, Washington, Andy Meeks was preparing to enter ninth grade.<sup>11</sup> Jill Kurfirst, Andy's mother, at-

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<sup>2</sup> *Id.* Students are first designated a "resides" school based upon the students' geographic locations within the district. *Id.* at 2749–50. Elementary schools are grouped into clusters to facilitate integration. *Id.* Each May, the district permits parents of kindergartners, first-graders, and students new to the district to submit school preferences among the schools in the cluster. *Id.* at 2749. Students who do not submit a preference are assigned to their "resides" school. *Id.*

<sup>3</sup> *Id.* at 2750.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 2749–50. Jefferson County adopted a voluntary student assignment plan in 2001 after the district court dissolved a 1975 desegregation decree. *Id.* at 2749; *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 360 (2000). The decree was initially entered after a federal court, in 1973, found that Jefferson County had maintained a segregated school system. *Hampton*, 102 F. Supp. 2d at 360. It was operable in Jefferson County until 2000, when the district court found that "the district had achieved unitary status by eliminating '[t]o the greatest extent practicable' the vestiges of its prior policy of segregation." *Id.*

<sup>6</sup> *Parents Involved*, 127 S. Ct. at 2749–50. The adopted voluntary student assignment plan required that all nonmagnet schools maintain a black enrollment of fifteen to fifty percent. *Id.* at 2749 (citing *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 839–40 (W.D. Ky. 2004)). A school is deemed to have reached the "extremes" of these racial guidelines when the black enrollment is outside of this range. *See id.* Students may request transfers for any number of reasons, and may be denied because of a lack of available space or on the basis of the racial guidelines. *Id.* at 2750.

<sup>7</sup> *Id.* at 2750.

<sup>8</sup> *Id.*; see Nina Totenberg, *Supreme Court to Weigh Schools' Racial Plans*, (National Public Radio broadcast Dec. 4, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=6567985>.

<sup>9</sup> *Parents Involved*, 127 S. Ct. at 2750.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 2748.

tempted to enroll him at Ballard High School.<sup>12</sup> The school had a special Biotechnology Career Academy.<sup>13</sup> Ms. Kurfirst and Andy's teachers thought the smaller program and hands-on instruction would help Andy continue to progress, despite his attention deficit hyperactivity disorder and dyslexia.<sup>14</sup> The district had a policy that permitted incoming ninth graders to rank the local high schools in order of preference.<sup>15</sup> Andy was accepted into the program and Ms. Kurfirst ranked Ballard first.<sup>16</sup> Despite his acceptance into the biotechnology program, Andy was not permitted to attend.<sup>17</sup>

Ballard High School was oversubscribed, so the district employed a series of "tiebreakers" to determine who would be assigned to each school.<sup>18</sup> Because Andy did not have any siblings attending Ballard, the first tiebreaker, the school administrators then considered the racial composition of the school and the race of the applicant, the second tiebreaker.<sup>19</sup> Since Ballard was not within the district's overall white to nonwhite racial balance, the district did not assign Andy because his race did not "serve to bring the school into balance."<sup>20</sup> He was denied assignment to Ballard High School because of race.<sup>21</sup> The year was 2000.<sup>22</sup>

Fifty years prior, in Topeka, Kansas, Linda Brown prepared for her third grade year at Monroe Elementary School.<sup>23</sup> Monroe was one of the four elementary schools that Linda, a black student, was permitted to attend.<sup>24</sup> Topeka, like cities in seventeen other states across

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Parents Involved*, 127 S. Ct. at 2748.

<sup>15</sup> *Id.* at 2746–47. Seattle School District No. 1 adopted the student assignment plan at issue in 1998. *Id.* at 2746. Under the plan, incoming ninth graders rank, in order of preference, their choices of school among any of the ten high schools within the district. *Id.* at 2746–47.

<sup>16</sup> *Id.* at 2748.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 2747. A school is considered oversubscribed when too many students list it as their first choice. *Id.*

<sup>19</sup> *Parents Involved*, 127 S. Ct. at 2747, 2748. The third tiebreaker is the geographic proximity of the school to the student's residence. *Id.* at 2747.

<sup>20</sup> *Id.* at 2747–48.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 2747.

<sup>23</sup> Paul E. Wilson, *The Genesis of Brown v. Board of Education*, 6 KAN. J.L. & PUB. POL'Y 7, 10, 11 (1996). See generally *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

<sup>24</sup> See Wilson, *supra* note 23, at 17.

the country, operated a state-sanctioned segregated school district: all white children attended one set of schools and all black children attended another.<sup>25</sup>

Linda's father, Oliver Brown, wanted Linda to attend Sumner Elementary School, located much closer to the Brown residence.<sup>26</sup> On enrollment day, Mr. Brown and Linda walked a few blocks to Sumner Elementary School to request that she be admitted.<sup>27</sup> Linda waited outside Principal Frank Wilson's office.<sup>28</sup> Principal Wilson had been expecting such an encounter.<sup>29</sup> He had been warned by Kenneth McFarland, the school's superintendent, that the local NAACP chapter would seek to enroll black students in schools reserved for white children.<sup>30</sup> Principal Wilson listened politely, but immediately refused.<sup>31</sup>

Topeka's Board of Education was authorized by statute to segregate their public schools by race.<sup>32</sup> Eight-year old Linda was not permitted to attend the "white only" Sumner Elementary School solely because of the color of her skin.<sup>33</sup>

Although occurring approximately fifty years apart, Joshua, Andy, and Linda were all denied enrollment at the public school of their choice because of race.<sup>34</sup> What distinguishes Joshua's and Andy's denial from that of Linda Brown? First, the color of their skin: Joshua and Andy are both white; Linda was black.<sup>35</sup> Second, Joshua's and Andy's school assignments were made in an effort to maintain diversity in their schools.<sup>36</sup> Linda's was denied in an effort to maintain segregation.<sup>37</sup>

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<sup>25</sup> See *id.* at 13.

<sup>26</sup> See *id.* at 10–11.

<sup>27</sup> See *id.* at 11.

<sup>28</sup> Jean Van Defender, *Capturing Forgotten Moments in Civil Rights History (Oral Histories)*, BROWN Q. (1999), available at <http://brownvboard.org/brwnqurt/03-1/03-1a.htm>.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> See KAN. GEN. STAT. § 72–1724 (1949) (repealed 1953) (permitting, but not requiring, cities with a population of more than 15,000 to maintain separate school facilities for black and white students); Van Defender, *supra* note 28; Wilson, *supra* note 23, at 9.

<sup>33</sup> See Van Defender, *supra* note 28; Wilson, *supra* note 23, at 11.

<sup>34</sup> See *Parents Involved*, 127 S. Ct. at 2748, 2750; *Brown I*, 347 U.S. at 488.

<sup>35</sup> See *Parents Involved*, 127 S. Ct. at 2748, 2750; *Brown I*, 347 U.S. at 387; NAACP, BRIEFING POINTS: SUPREME COURT SCHOOL DESEGREGATION CASES, <http://www.naacp.org/advocacy/education/Information> (last visited Nov. 15, 2008).

<sup>36</sup> See *Parents Involved*, 127 S. Ct. at 2755.

<sup>37</sup> See *Brown I*, 347 U.S. at 387–88.

After a dramatic increase in integration during the civil rights era, there has been a national trend toward the resegregation of America's public schools since the early 1990s.<sup>38</sup> Segregation has adverse affects on the educational development of students by undermining the benefits of diversity.<sup>39</sup> However, the Supreme Court held in both *Joshua's* and *Andy's* cases that the use of race as a factor in school assignment, even for purposes of increased diversity, violated the Fourteenth Amendment to the Constitution.<sup>40</sup>

The Equal Protection Clause of the Fourteenth Amendment states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>41</sup> The landmark case of *Brown v. Board of Education*, decided in 1954, held that Sumner Elementary School's segregation was a denial of the equal protection of the laws, a violation of the Fourteenth Amendment.<sup>42</sup> The Supreme Court ruled that school districts had to allow black children, and all other "children of the minority group," to attend the same schools as white children.<sup>43</sup>

Similarly, in *Parents Involved in Community Schools v. Seattle School District No. 1*, and companion case *Meredith v. Jefferson County Board of Education*, both decided in 2007, the Supreme Court held that the plans of the two school districts violated the Fourteenth Amendment by using race as a factor in school assignment.<sup>44</sup> The Supreme Court held that schools could not artificially manufacture diverse student populations by considering race in school assignment.<sup>45</sup>

*Parents Involved* is the latest decision in the Court's jurisprudence dealing with race-conscious policies in education.<sup>46</sup> The decision in

<sup>38</sup> See ANURIMA BHARGAVA ET AL., STILL LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION 10-15 (2008), available at [http://www.civilrightsproject.ucla.edu/research/descg/still\\_looking\\_to\\_the\\_future\\_integration\\_manual.pdf](http://www.civilrightsproject.ucla.edu/research/descg/still_looking_to_the_future_integration_manual.pdf).

<sup>39</sup> See *Parents Involved*, 127 S. Ct. at 2820-21 (Breyer, J., dissenting); *Brown I*, 347 U.S. at 494-95; BHARGAVA ET AL., *supra* note 38, at 17-22.

<sup>40</sup> See *Parents Involved*, 127 S. Ct. at 2746, 2764 (plurality opinion).

<sup>41</sup> U.S. CONST. amend. XIV, § 1.

<sup>42</sup> See *Brown I*, 347 U.S. at 495; Wilson, *supra* note 23, at 11.

<sup>43</sup> See *Brown I*, 347 U.S. at 493.

<sup>44</sup> See *Parents Involved*, 127 S. Ct. at 2746 (plurality opinion).

<sup>45</sup> See *id.* at 2746.

<sup>46</sup> See *id.* at 2738, 2746; James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 131 (2007). It is the third case involving race-conscious policies in education decided in the last five years, representing a marked increase in the level of attention paid by the Court to integration and affirmative action. See generally *Parents Involved*, 127 S. Ct. at 2746 (holding race-conscious assignment program unconstitutional); *Grutter v. Bollinger*, 539 U.S. 306, 343-44 (2003) (holding affirmative action program at University

*Parents Involved* is a continuation of the Court's consistent disfavor of continued desegregation efforts and racial classifications, even when benign.<sup>47</sup> Although the Court acknowledged the importance of diversity in education and did not foreclose the use of race-conscious assignment plans, *Parents Involved* has "severely limited the very tools school districts need to achieve integration and avoid segregation."<sup>48</sup> The Court's application of strict scrutiny adopted the jurisprudence of "strict in theory, but fatal in fact" from affirmative action cases and applied it to race-conscious assignment policies.<sup>49</sup>

This Note argues that the *Parents Involved* Court should not have applied strict scrutiny to analyze the race-conscious student assignment plans for several reasons.<sup>50</sup> First, the Constitution is not color-blind: the Fourteenth Amendment's Equal Protection Clause neither proscribes nor compels a strict scrutiny analysis for all racial classifica-

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of Michigan Law School constitutional); *Gratz v. Bollinger*, 539 U.S. 244, 250–251 (2003) (holding undergraduate affirmative action policy at University of Michigan unconstitutional). Despite opportunities to hear other cases involving affirmative action in education, the Court has repeatedly declined. *See, e.g.,* *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 6 (1st Cir. 2005); *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000). Until *Grutter* and *Gratz* were decided in 2003, the Supreme Court had not dealt with voluntary affirmative action in education for twenty-five years. *See Grutter*, 539 U.S. at 322; *Gratz*, 539 U.S. at 244.

<sup>47</sup> *See Parents Involved*, 127 S. Ct. at 2738, 2746; Philip C. Aka, *The Supreme Court and Affirmative Action in Public Education, with Special Reference to the Michigan Cases*, 2006 BYU EDUC. & L.J. 1, 69 (2006); Lia B. Epperson, *True Integration: Advancing Brown's Goal of Educational Equality in the Wake of Grutter*, 67 U. PITT. L. REV. 175, 176 (2005); *see also* *Adarand Constructors v. Peña*, 515 U.S. 200, 224, 226 (1995) (holding that strict scrutiny applies when analyzing all policies that involve racial classifications, whether benign or invidious); *Missouri v. Jenkins*, 515 U.S. 70, 96, 98 (1995) (holding that efforts to reduce segregation resulting from housing segregation were beyond the scope of Court's authority); *Freeman v. Pitts*, 503 U.S. 467, 495 (1992) (holding school districts could be released from desegregation decrees despite persistence of segregation in schools); *Bd. of Educ. v. Dowell*, 498 U.S. 238, 250 (1991) (holding incremental release from desegregation decrees permissible when the school had complied in good faith with the order, even if segregation still existed).

<sup>48</sup> *See Parents Involved*, 127 S. Ct. at 2738, 2755; *id.* at 2791 (Kennedy, J., concurring); *id.* at 2820–21 (Breyer, J., dissenting); Press Release, Civil Rights Project, Court Decisions: Race-Conscious Admissions Policies Challenged: University Of Michigan's Affirmative Action Under Fire (June 28, 2007), available at <http://civilrightsproject.ucla.edu/policy/court/michigan03.php>.

<sup>49</sup> *See Parents Involved*, 127 S. Ct. at 2817–18 (Breyer, J., dissenting); *see, e.g., Adarand*, 515 U.S. at 210, 239.

<sup>50</sup> *See Parents Involved*, 127 S. Ct. at 2751–52.

tions.<sup>51</sup> Second, race-conscious student assignment policies should be analyzed as an extension of the Court's desegregation jurisprudence because they are distinguishable from affirmative action programs.<sup>52</sup>

Part I of this Note chronicles the Court's jurisprudence on race-conscious policies in education in four phases: desegregation, resegregation, affirmative action, and the standards of review. Part II provides an overview of the *Parents Involved* decision as it relates to the strict scrutiny standard used to analyze race-conscious policies. Part III argues that the Court has erred in applying strict scrutiny analysis to the race-conscious student assignment policies at issue.

## I. AFFIRMATIVE ACTION AND RACE-CONSCIOUS ASSIGNMENT POLICIES: PAST AND PRESENT

### A. *The Evolution of Desegregation Jurisprudence*

It was not until the Court's 1954 landmark decision in *Brown v. Board of Education* that black citizens began to make headway toward equality in the wake of *Plessy v. Ferguson*.<sup>53</sup> In *Brown*, the Court unanimously concluded that "in the field of public education the doctrine of 'separate but equal' has no place."<sup>54</sup> Segregating schools based solely on race violated the Equal Protection Clause because it deprived minority children of equal education opportunities.<sup>55</sup>

While *Brown* made state-imposed segregation unconstitutional, the Court permitted segregated schools to desegregate "with all *deliberate*

<sup>51</sup> See U.S. CONST. amend. XIV, § 1; *Parents Involved*, 127 S. Ct. at 2815, 2817 (Breyer, J., dissenting) (citing *Adarand*, 515 U.S. at 218); see, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

<sup>52</sup> See GIRARDEAU A. SPANN, *THE LAW OF AFFIRMATIVE ACTION* 11 (2000); Deborah N. Archer, *Moving Beyond Strict Scrutiny: The Need for a More Nuanced Standard of Equal Protection Analysis for K Through 12 Integration Programs*, 9 U. PA. J. CONST. L. 629, 646–47 (2007).

<sup>53</sup> See *Brown v. Bd. of Educ.* (*Brown I*), 347 U.S. 483, 494–95 (1954); *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896); Aka, *supra* note 47, at 26–27. Holding that a Louisiana law mandating segregated railroad cars did not violate the Equal Protection Clause of the Fourteenth Amendment, the *Plessy* Court upheld the doctrine of "separate but equal." See *Plessy*, 163 U.S. at 544, *overruled by Brown I*, 347 U.S. at 495. The Court stated that the purpose of the Fourteenth Amendment was undoubtedly to enforce the absolute equality of the two races before the law; but, "in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social . . . equality . . ." See *id.*

<sup>54</sup> *Brown I*, 347 U.S. at 486, 495.

<sup>55</sup> See *id.* at 493.



speed.”<sup>56</sup> Many school districts interpreted this as a license to continue segregating, at least until the mid-1960s and early 1970s.<sup>57</sup> In fact, it was not until 1968, fourteen years after deciding *Brown* that the Court held that schools were required “to convert *promptly* to a system without a ‘white’ school and a ‘negro’ school, but just schools.”<sup>58</sup>

In 1971, the Court in *Swann v. Charlotte-Mecklenburg* ruled that district courts had the authority to mandate desegregation plans.<sup>59</sup> The lower courts could use racial classifications to determine student assignments, assuming the classifications were directly related to achieving the goal of desegregation.<sup>60</sup> Schools could no longer satisfy *Brown* by permitting black students to attend previously “white only” schools but by assigning students, based on race, to separate schools.<sup>61</sup>

The scope of *Brown* was further extended in *Keyes v. School District No. 1*.<sup>62</sup> The *Keyes* Court held that even in the absence of statutory segregation, it would only be common sense to conclude there was a dual school system when “school authorities . . . carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities.”<sup>63</sup> After *Keyes*, schools that had not operated a statutory dual system could still “have an affirmative duty ‘to effectuate a transition to a racially nondiscriminatory school system,’” if the plaintiff could prove that segregated schools existed and were

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<sup>56</sup> See *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955) (emphasis added).

<sup>57</sup> See BHARGAVA ET AL., *supra* note 38, at 6.

<sup>58</sup> See *Green v. County Sch. Bd.*, 391 U.S. 430, 442 (1968) (emphasis added). The Court in *Green* placed on the public schools the “affirmative duty to take whatever steps might be necessary” to eliminate the effects of prior discriminatory conduct “root and branch.” 391 U.S. at 437–38; Kevin Brown, *The Constitutionality of Racial Classifications in Public School Admissions*, 29 HOFSTRA L. REV. 1, 69 (2000). The school district’s student assignment plan permitting parents to choose their child’s school did not result in desegregation and was unacceptable. See *Green*, 391 U.S. at 437–38. The Court required a plan “that promises realistically to work, and promises realistically to work *now*.” *Id.* at 439.

<sup>59</sup> See 402 U.S. 1, 15 (1971); BHARGAVA ET AL., *supra* note 38, at 6; Victor Goode, *Affirmative Action and School Choice: The Courts and the Consideration of Race*, 169 PLI/NY 7, 18 (2007).

<sup>60</sup> See *Swann*, 402 U.S. at 24–25; Goode, *supra* note 59, at 18. Although classifications based solely on race typically violate the Equal Protection Clause, the Court recognized that a student’s race must be considered to achieve integration. See *Swann*, 402 U.S. at 24–25.

<sup>61</sup> See *Swann*, 402 U.S. at 15 (citing *Green*, 391 U.S. at 437–38); *Brown I*, 347 U.S. at 495.

<sup>62</sup> See *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 213–14 (1973); *Brown I*, 347 U.S. at 495.

<sup>63</sup> See *Keyes*, 413 U.S. at 213–14; Goode, *supra* note 59, at 15.

“maintained by intentional state action.”<sup>64</sup> By defining *de jure* segregation in this manner, the Court could now reach schools outside the South that had employed segregation policies.<sup>65</sup> Unfortunately, this case also established the distinction between *de jure* segregation and *de facto* segregation.<sup>66</sup>

Some schools voluntarily chose to adopt race-conscious assignment plans to foster integration and to avoid mandatory court-ordered desegregation.<sup>67</sup> For example, in Georgia, the Clark County Board of Education student assignment plan relied upon geographic attendance zones drawn by the district to increase racial diversity.<sup>68</sup> Challenged by parents, the voluntary program was upheld in *McDaniel* and remains good law.<sup>69</sup>

However, by the mid-1970s the Court began to limit the scope of permissible desegregation efforts.<sup>70</sup> Urban schools in Detroit, Michigan, had been involved in purposeful discrimination, which resulted in a majority of minority students.<sup>71</sup> The lower court’s remedy involved busing students from the urban Detroit districts to adjacent suburban school districts.<sup>72</sup> The Supreme Court struck down this plan, holding that only the districts that had committed the constitutional violation would be ordered to remedy the segregation.<sup>73</sup> This excluded the sub-

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<sup>64</sup> *Keyes*, 413 U.S. at 198, 203.

<sup>65</sup> See BHARGAVA ET AL., *supra* note 38, at 6. School segregation can be *de jure* or *de facto*. *Id.* at 5. The Court has defined *de jure* segregation as “a current condition of segregation resulting from intentional state action.” *Keyes*, 413 U.S. at 205–06. The “differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is purpose or intent to segregate.” *Id.* at 208. Schools previously segregated by law have a “duty and responsibility . . . to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system.” *Freeman v. Pitts*, 503 U.S. 467, 485 (1992). Unlike *de jure* segregation, *de facto* segregation does not have authority of law, but results from other influences such as housing patterns. BHARGAVA ET AL., *supra* note 38, at 5. School districts are not required to attempt to remedy racial imbalance “when the imbalance is attributable neither to the prior *de jure* system nor to a later violation by the school district but rather to independent demographic forces.” *Freeman*, 503 U.S. at 493.

<sup>66</sup> See *Keyes*, 413 U.S. at 203.

<sup>67</sup> See e.g., *McDaniel v. Barresi*, 402 U.S. 39, 40–41 (1971).

<sup>68</sup> See *id.* at 40.

<sup>69</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2761 (2007) (distinguishing *McDaniel* as limited to instances of *de jure* segregation); *McDaniel*, 402 U.S. at 40, 42.

<sup>70</sup> See *Milliken v. Bradley*, 418 U.S. 717, 752 (1974); BHARGAVA ET AL., *supra* note 38, at 7.

<sup>71</sup> See *Milliken*, 418 U.S. at 724–26.

<sup>72</sup> See *id.* at 734; Goode, *supra* note 59, at 16.

<sup>73</sup> See *Milliken*, 418 U.S. at 752.

urban districts from being involved in the remedy, effectively ending integration efforts in Detroit.<sup>74</sup>

Despite initial resistance to integration and the court-imposed limitations on permissible integration programs, the country saw dramatic increases in integration across the country.<sup>75</sup> Unfortunately, integration may have peaked immediately following the civil rights era.<sup>76</sup>

### B. *The Resegregation of America's Public School System*

During the civil rights era, the percentage of black students in white-majority schools in the South increased from two percent to thirty-three percent.<sup>77</sup> The high watermark for desegregation occurred in the late 1980s, when forty-four percent of black students attended white-majority schools.<sup>78</sup> However, in the early 1990s, the Court began to relax desegregation standards, initiating the resegregation of America's public schools.<sup>79</sup>

School systems that had complied in good faith with earlier desegregation orders and had eliminated, to the extent practicable, the traces of the prior *de jure* segregation were released from court supervision beginning in 1991 in *Dowell*.<sup>80</sup> The following year, in *Freeman v. Pitts*, the Court authorized an incremental release from certain aspects of earlier imposed desegregation decrees when the district could demonstrate "good-faith compliance . . . over a reasonable period of time" despite continuing disparities in areas such as faculty and quality of education.<sup>81</sup> By 1995 the Court sought to end federal court supervision of desegregation orders.<sup>82</sup> In *Jenkins*, the Court ruled that some racial

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<sup>74</sup> See *id.*

<sup>75</sup> See *id.*; GARY ORFIELD & CHUNGMEI LEE, CIVIL RIGHTS PROJECT, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 13 (2006), available at [http://www.civilrightsproject.ucla.edu/research/deseg/racial\\_transformation.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/racial_transformation.pdf).

<sup>76</sup> See ORFIELD & LEE, *supra* note 75, at 13; Epperson, *supra* note 47, at 182.

<sup>77</sup> See ORFIELD & LEE, *supra* note 75, at 13.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*; see, e.g., *Freeman*, 503 U.S. at 485 (1992) (holding that the "district court may relinquish its supervision and control over those aspects of a school system in which there has been compliance with a desegregation decree if other aspects of the system remain in noncompliance").

<sup>80</sup> See *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249–50 (1991); BHARGAVA ET AL., *supra* note 38, at 9.

<sup>81</sup> See *Freeman*, 503 U.S. at 483, 485, 490, 492; BHARGAVA ET AL., *supra* note 38, at 9.

<sup>82</sup> See *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995).

disparities, in areas such as academic achievement, are beyond the authority of federal courts to address.<sup>83</sup>

The Court's holdings in *Dowell*, *Freeman*, and *Jenkins* led to resegregation for black students in all regions and at all levels: national, regional, and district.<sup>84</sup> Since the early 1990s the level of desegregation for black students declined to its lowest level in the last thirty years.<sup>85</sup> In the 2004–2005 school year, nearly forty percent of black and Latino students attended schools with minority populations representing ninety-nine to one hundred percent of the student body as a whole.<sup>86</sup> In every region of the country, there were more black students attending segregated schools in 2003 than in 1988.<sup>87</sup> Studies show a clear pattern of growing racial isolation.<sup>88</sup>

### C. Affirmative Action in Higher Education: Bakke, Grutter, and Gratz

In the atmosphere of integration during the late 1960s and early 1970s, many institutions of higher education adopted affirmative action admissions programs in search of a more diverse and integrated student body.<sup>89</sup> The Court, however, restricted such integration efforts in 1979 when it confronted the issue of affirmative action programs in

<sup>83</sup> See *id.* at 101–02.

<sup>84</sup> See *id.* at 73, 80–82, 103; *Freeman*, 503 U.S. at 490; *Dowell*, 498 U.S. at 249–50; BHARGAVA ET AL., *supra* note 38, at 11; ORFIELD & LEE, *supra* note 75, at 9.

<sup>85</sup> See BHARGAVA ET AL., *supra* note 38, at 10–11.

<sup>86</sup> *Id.* The face of segregation in America has also changed during this time. See BHARGAVA ET AL., *supra* note 38, at 10; GARY ORFIELD & CHUNGMEI LEE, CIVIL RIGHTS PROJECT, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 15–17 (2007). While segregation was historically regarded as an issue between black students and white students, the racial compositions of public schools in 2007 was vastly different, with Latino students representing the largest minority group in public schools. ORFIELD & LEE, *supra*, at 15–16. In the late 1960s eighty percent of students attending public schools were white. *Id.* at 15. As of 2005, that percentage had dropped to fifty-seven percent. *Id.* at 16. Latino students represent the largest minority group, twenty percent, and black students comprise seventeen percent of our nation's public schools. *Id.* Asians now represent eight percent of public school enrollment. *Id.* Overall, students of color currently comprise over forty percent of all U.S. public school students, more than double the share of students in the 1960s. See BHARGAVA ET AL., *supra* note 38, at 10.

<sup>87</sup> BHARGAVA ET AL., *supra* note 38, at 12; ORFIELD & LEE, *supra* note 86, at 16.

<sup>88</sup> See, e.g., BHARGAVA ET AL., *supra* note 38, at 11–13; ORFIELD & LEE, *supra* note 86, at 16.

<sup>89</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003); Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 619 (1998).

higher education for the first time in *Regents of University of California v. Bakke*.<sup>90</sup>

At issue in *Bakke* was an affirmative action admissions program at the University of California at Davis Medical School.<sup>91</sup> The school earmarked sixteen out of the one hundred available seats for members of minority groups.<sup>92</sup> A panel convened specifically to review minority applicants to fill those sixteen seats, meaning that minority and white applicants were assessed separately.<sup>93</sup> Justices Stevens, Burger, Stewart, and Rehnquist struck down the policy as a violation of Title VII of the Civil Rights Act.<sup>94</sup> Justice Powell concurred in the outcome, but wrote separately, authoring what has become "the touchstone for constitutional analysis of race-conscious admissions policies."<sup>95</sup>

In his opinion, Justice Powell stated that that a diverse student body is a constitutionally-permissible goal, but he rejected rigid quotas.<sup>96</sup> His views on race-conscious policies served as the model for universities across the country.<sup>97</sup> Undoubtedly, Justice Powell influenced the admissions policies of the University of Michigan Law School and University of Michigan College of Literature, Science, and the Arts that came under attack in 2003.<sup>98</sup>

In *Grutter v. Bollinger* and *Gratz v. Bollinger*, both decided in April 2003, the Court addressed the issue of affirmative action in public

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<sup>90</sup> See 438 U.S. 265, 271 (1978). The Court was first presented with the issue of affirmative action in 1974 in *DeFunis v. Odegaard*, but dismissed the case as moot because the plaintiff was already in his last year of school. See 416 U.S. 312, 316, 320 (1974); Aka, *supra* note 47, at 34.

<sup>91</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 271, 274–75 (1978).

<sup>92</sup> *Id.* at 275.

<sup>93</sup> See *id.* at 274–75.

<sup>94</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000d (1964); see *Bakke*, 438 U.S. at 421 (Stevens, J., concurring). These justices did not address the constitutional issue of whether the program was a violation of the Equal Protection Clause. See U.S. CONST. amend. XIV, § 1; *Bakke*, 438 U.S. at 411, 421.

<sup>95</sup> See *Grutter*, 539 U.S. at 323; *Bakke*, 438 U.S. at 269.

<sup>96</sup> *Bakke*, 438 U.S. at 311–12, 315 ("The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics [than racial or ethnic origin].").

<sup>97</sup> See *Grutter*, 539 U.S. at 323; *Bakke*, 438 U.S. at 269; CIVIL RIGHTS PROJECT, JOINT STATEMENT OF CONSTITUTIONAL LAW SCHOLARS, REAFFIRMING DIVERSITY: A LEGAL ANALYSIS OF THE UNIVERSITY OF MICHIGAN AFFIRMATIVE ACTION CASES 3–4 (2003) available at [http://www.civilrightsproject.ucla.edu/policy/legal-docs/diversity\\_reaffirmed.pdf](http://www.civilrightsproject.ucla.edu/policy/legal-docs/diversity_reaffirmed.pdf).

<sup>98</sup> See *Grutter*, 539 U.S. at 311, 323; *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003); *Bakke*, 438 U.S. at 269; CIVIL RIGHTS PROJECT, *supra* note 97, at 3–4.

higher education for the first time since *Bakke*.<sup>99</sup> The University of Michigan Law School used a comprehensive approach, considering the candidates' race as a "plus factor" in the holistic and "individualized consideration of each and every applicant."<sup>100</sup> The University of Michigan undergraduate college, however, automatically awarded twenty points to underrepresented minority applicants based solely on race.<sup>101</sup> The twenty points had "the effect of making 'the factor of race . . . decisive' for virtually every minimally-qualified underrepresented minority applicant."<sup>102</sup> By upholding the admissions policy of the Law School in *Grutter* and striking down the policy of the undergraduate college in *Gratz*, the Court clarified the acceptable role of affirmative action in higher education.<sup>103</sup> Educational institutions are "not barred from any and all consideration of race when making admissions decisions."<sup>104</sup> In the context of admissions, that consideration must be flexible and individualized as opposed to mechanistic.<sup>105</sup>

The Court's decision in *Grutter* is particularly significant because it acknowledges that attaining a diverse student body is a compelling state interest in the context of higher education.<sup>106</sup> Until this time, remedying past discrimination had been the only recognized justification for race-based governmental action.<sup>107</sup> The Court gave significant deference to the Law School's judgment that a diverse student body was essential to its educational mission.<sup>108</sup> The benefits of diversity were praised as substantial, noting that diversity promotes "cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races."<sup>109</sup>

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<sup>99</sup> See *Grutter*, 539 U.S. at 323; *Gratz*, 539 U.S. at 249–50; *Bakke*, 438 U.S. at 271.

<sup>100</sup> *Grutter*, 539 U.S. at 334.

<sup>101</sup> *Gratz*, 539 U.S. at 271–72.

<sup>102</sup> *Id.*

<sup>103</sup> See *Grutter*, 539 U.S. at 333–34, 343; *Gratz*, 539 U.S. at 272–74.

<sup>104</sup> See *Gratz*, 539 U.S. at 298 (Ginsburg, J., dissenting).

<sup>105</sup> See *Grutter*, 539 U.S. at 334, 337.

<sup>106</sup> See *Grutter*, 539 U.S. at 328; see also *Parents Involved*, 127 S. Ct. at 2753 (recognizing *Grutter*'s holding that diversity in higher education is a compelling government interest).

<sup>107</sup> Compare *Grutter*, 539 U.S. at 328 (holding diversity as a compelling interest), with *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (stating that unless classifications based on race are "strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility").

<sup>108</sup> *Grutter*, 539 U.S. at 328.

<sup>109</sup> See *id.* at 330 (internal quotations omitted).

By distinguishing the policy in *Gratz* from that in *Grutter*, the Court carved out an acceptable form for affirmative action programs in higher education.<sup>110</sup> The policy in *Grutter* was narrowly tailored to further the compelling governmental interest of attaining a diverse student body because it used race as a “plus” factor that was considered alongside other factors in an individual assessment of each applicant.<sup>111</sup> In contrast, the policy that was struck down in *Gratz* automatically awarded an underrepresented minority applicant twenty points—one-fifth of the points needed to guarantee admission to the University.<sup>112</sup> This policy was too mechanistic for the Court because, by awarding those points, the school did not consider an applicant’s “individual potential contribution to diversity.”<sup>113</sup>

#### D. *Strict Scrutiny Jurisprudence with Regard to Race*

In *Grutter* and *Gratz*, the Court held that all instances of race-based affirmative action are to be reviewed with strict scrutiny.<sup>114</sup> Statutes restricting the exercise of fundamental rights under the Equal Protection Clause are “constitutional only if they are narrowly tailored measures that further compelling governmental interests.”<sup>115</sup> Although strict scrutiny is now the accepted constitutional standard, the Court initially struggled to reach that conclusion.<sup>116</sup> For years, the Court was split on whether affirmative action policies should be reviewed under the same standard as invidious race categorizations.<sup>117</sup> Now, not only is strict scrutiny the accepted standard of review, but it has evolved into a “strict in theory, but fatal in fact” analysis.<sup>118</sup> Until *Grutter*, the Court had never

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<sup>110</sup> See *Grutter*, 539 U.S. at 337; *Gratz*, 539 U.S. at 270, 271.

<sup>111</sup> See *Grutter*, 539 U.S. at 334.

<sup>112</sup> See *Gratz*, 539 U.S. at 270.

<sup>113</sup> See *id.* at 273–74 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (internal quotations omitted)).

<sup>114</sup> See *Grutter*, 539 U.S. at 327; *Gratz*, 539 U.S. at 270.

<sup>115</sup> *Adarand Constructors, v. Peña*, 515 U.S. 200, 227 (1995).

<sup>116</sup> See *Grutter*, 539 U.S. at 326; *Adarand*, 515 U.S. at 221.

<sup>117</sup> Compare *Adarand*, 518 U.S. at 224, 226–27 (holding all racial classifications, whether benign or invidious, subject to review under strict scrutiny), with *Metro Broad. v. FCC*, 497 U.S. 547, 564–65 (1990) (holding benign race-conscious measures are analyzed under an intermediate standard of review).

<sup>118</sup> See *Parents Involved*, 127 S. Ct. at 2817–18 (Breyer, J., dissenting); Archer, *supra* note 52, at 644 n.98; Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *In Defense of Deference*, 21 CONST. COMMENT. 133, 159 (2004).

upheld an affirmative action policy in the face of a strict scrutiny analysis.<sup>119</sup>

Initially, *Plessy*'s separate but equal doctrine of race-based classifications was upheld in the face of Equal Protection Clause challenges if the classifications were "reasonable, . . . enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class."<sup>120</sup> The Court moved away from this rational basis approach during the civil rights era.<sup>121</sup> Laws utilizing race-based classifications would be upheld "only if [they were] necessary, and not merely rationally related, to the accomplishment of a permissible state policy."<sup>122</sup> This era of case law laid the groundwork for a strict scrutiny analysis.<sup>123</sup>

A plurality opinion in *Bakke* suggested that strict scrutiny was the proper standard of review.<sup>124</sup> Justice Powell's decisive fifth vote to strike the affirmative action program called for "the most exacting judicial examination," thus implying that racial classifications should be reviewed under strict scrutiny.<sup>125</sup> Some consider *Bakke* to be the first use of strict scrutiny in reviewing race-based affirmative action programs.<sup>126</sup>

Over the following decade, the Court could not come to a consensus on the proper standard, despite some Justices' consistent support for strict scrutiny.<sup>127</sup> It was not until 1989 that a majority of the Court analyzed race-based affirmative action measures under strict scrutiny.<sup>128</sup> In *J.A. Croson Co.*, the Court held that strict scrutiny is the applicable standard when reviewing all governmental classifications by

<sup>119</sup> See *Grutter*, 539 U.S. at 326; Fuentes-Rohwer & Charles, *supra* note 118, at 159; see, e.g., *J.A. Croson Co.*, 488 U.S. at 511.

<sup>120</sup> See *Plessy*, 163 U.S. at 550.

<sup>121</sup> See *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (holding race-based policies subject to the "most rigid scrutiny"); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1277 (2007).

<sup>122</sup> See *McLaughlin*, 379 U.S. at 196.

<sup>123</sup> See *McLaughlin*, 379 U.S. at 196; *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); Fallon, *supra* note 121, at 1277.

<sup>124</sup> See *Bakke*, 438 U.S. at 271, 357 (Brennan, J., concurring in judgment and dissenting in part, joined by White, Marshall, & Blackmun, JJ.).

<sup>125</sup> See *id.* at 291, 305 (Powell, J., concurring); Goode, *supra* note 59, at 23.

<sup>126</sup> See, e.g., Fallon, *supra* note 121, at 1278.

<sup>127</sup> See *Adarand*, 515 U.S. at 221; see, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 496, 519 (1980) (failing to reach majority consensus on the proper standard of review).

<sup>128</sup> See *J.A. Croson Co.*, 488 U.S. at 493, 520.



race, whether remedial or benign.<sup>129</sup> Applying strict scrutiny, the Court struck down a city ordinance that obligated preference for minority business enterprises.<sup>130</sup> The Court held that remedying societal discrimination was not a sufficient compelling interest under strict scrutiny.<sup>131</sup> Therefore, voluntarily-adopted race-conscious remedies would be considered presumptively invalid.<sup>132</sup>

In *Adarand Constructors v. Peña*, decided in 1995, the Court affirmed and expanded the standard by holding that federal affirmative action programs must also be analyzed under strict scrutiny.<sup>133</sup> Although the Court acknowledged the unfortunate reality of societal discrimination, it nevertheless struck down the federal affirmative action program.<sup>134</sup> Since *Adarand*, the Court has uniformly applied the standard of strict scrutiny to racial classifications, both benign and invidious.<sup>135</sup>

Race-based affirmative action policies analyzed under strict scrutiny have almost always been held unconstitutional.<sup>136</sup> Despite the Court's insistence otherwise, a strict scrutiny review of racial classifications may indeed be "strict in theory, but fatal in fact."<sup>137</sup> In reality, only one affirmative action admissions program has ever survived this exacting standard.<sup>138</sup>

<sup>129</sup> See *id.* The Court stated, "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." See *id.* at 493.

<sup>130</sup> See *id.* at 477-78.

<sup>131</sup> See *id.* at 499 ("While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia."); see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.").

<sup>132</sup> See *J.A. Croson Co.*, 488 U.S. at 493; Brent E. Simmons, *Reconsidering Strict Scrutiny of Affirmative Action*, 2 MICH. J. RACE & L. 51, 55 (1996).

<sup>133</sup> See *Adarand*, 515 U.S. at 224, 227 (overruling *Metro Broad. v. FCC*, 497 U.S. 547, 564-65 (1990)).

<sup>134</sup> *Id.* at 237.

<sup>135</sup> See *id.* at 226-27; see, e.g., *Parents Involved*, 127 S. Ct. at 2764-65.

<sup>136</sup> See, e.g., *J.A. Croson Co.*, 488 U.S. at 493; Goode, *supra* note 59, at 27.

<sup>137</sup> *Grutter*, 539 U.S. at 326; see *Parents Involved*, 127 S. Ct. at 2817 (Breyer, J., dissenting).

<sup>138</sup> *Grutter*, 539 U.S. at 326; see, e.g., *Gratz*, 539 U.S. at 270.

## II. PARENTS INVOLVED: RACE-CONSCIOUS ASSIGNMENT POLICIES IN K–12 SCHOOLS

### A. *A Blow to Brown?*

*Parents Involved* marked the first time the Court considered the constitutionality of voluntary race-conscious assignment policies in K–12 schools.<sup>139</sup> Jefferson County and Seattle School District both asserted that the “educational and broader socialization benefits [that] flow from a racially diverse learning environment” are a compelling state interest.<sup>140</sup> Chief Justice Roberts dismissed the school district’s claims of a compelling government interest despite broad language extolling the benefits of diversity in *Grutter*.<sup>141</sup>

Despite a plurality of Justices striking down the policies, five of the Justices agreed that diversity in primary and secondary education is a compelling state interest.<sup>142</sup> According to Justice Kennedy, “[i]n the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.”<sup>143</sup> Justice Breyer posits, “[i]f an educational in-

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<sup>139</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2754 (2007); Epperson, *supra* note 47, at 212. Justice Roberts, writing for the Court, did not decide “whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits.” See *Parents Involved*, 127 S. Ct. at 2755. However, the compelling interest asserted by the schools was not included in either category of previously-recognized compelling government interests of remedying the effects of *de jure* segregation or diversity in higher education. See *id.* at 2752–53, 2754.

<sup>140</sup> See *Parents Involved*, 127 S. Ct. at 2755.

<sup>141</sup> See *id.* at 2754 (limiting *Grutter* to the unique context of higher education); *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

<sup>142</sup> See *Parents Involved*, 127 S. Ct. at 2797, 2835 (Breyer, J., dissenting). Justices Roberts, Scalia, Thomas, Alito, and Kennedy held the race-conscious student assignment plans unconstitutional because they were not narrowly tailored to the compelling government interest. See *id.* at 2755 (plurality opinion); *Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring). Justice Kennedy, although holding that the policies were not narrowly tailored, believed that “[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.” See *Parents Involved*, 127 S. Ct. at 2789, 2791 (Kennedy, J., concurring). Justices Breyer, Stevens, Souter, and Ginsburg dissented, holding that the policies were narrowly tailored to achieve a compelling government interest. See *id.* at 2835 (Breyer, J., dissenting).

<sup>143</sup> See *id.* at 2792 (Kennedy, J., concurring).

terest that combines [remedial, educational, and democratic] elements is not 'compelling,' what is?"<sup>144</sup>

By striking down such policies, the Court severely limited the ability of elementary and secondary schools to adopt integration initiatives voluntarily.<sup>145</sup> Upholding a similar policy, the Massachusetts District Court stated that

[t]o say that school officials in the K-12 grades, acting in good faith, cannot take steps to remedy the extraordinary problems of *de facto* segregation and promote multiracial learning, is to go further than ever before to disappoint the promise of *Brown*. It is to admit that in 2003, resegregation of the schools is a tolerable result, as if the only problems *Brown* addressed were bad people and not bad impacts.<sup>146</sup>

In 2003 the Massachusetts court understood that to strike down race-conscious student assignment policies would be contrary to *Brown*; yet in 2007 the Supreme Court's holding that schools cannot voluntarily adopt race-conscious assignment policies for the purpose of increasing integration has rendered the promise of *Brown* unfulfilled.<sup>147</sup>

#### B. *Standard of Review: "Strict in scrutiny, but fatal in fact"*

The *Parents Involved* plurality disagreed with Justice Breyer's dissent as to the proper standard of review for race-conscious assignment policies.<sup>148</sup> This is not surprising given the Court's history of debate and disagreement on the issue.<sup>149</sup> Despite no majority holding, five Justices analyzed the race-conscious assignment policies with strict scrutiny.<sup>150</sup>

<sup>144</sup> See *id.* at 2823, 2835 (Breyer, J., dissenting).

<sup>145</sup> See *id.* at 2746 (plurality opinion); *id.* at 2833-34 (Breyer, J., dissenting).

<sup>146</sup> *Comfort v. Lynn Sch. Comm.*, 263 F. Supp. 2d 209, 228, 271, 280 (D. Mass. 2003) (upholding the constitutionality of a school assignment policy that accounted for the "the racial composition of the sending and receiving schools and the student's race").

<sup>147</sup> See *Parents Involved*, 127 S. Ct. at 2800-01, 2836-37 (Breyer, J., dissenting); *Comfort*, 263 F. Supp. 2d at 271.

<sup>148</sup> See *Parents Involved*, 127 S. Ct. at 2751 (plurality opinion); *id.* at 2817-20 (Breyer, J., dissenting).

<sup>149</sup> See, e.g., *Metro Broad. v. FCC*, 497 U.S. 547, 564, 565 (1990), *overruled by* *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995).

<sup>150</sup> See *Parents Involved*, 127 S. Ct. at 2751 (plurality opinion); *id.* at 2789 (Kennedy, J., concurring).

Chief Justice Roberts, writing for the plurality, affirmed strict scrutiny as the proper standard of review.<sup>151</sup> Citing *Adarand*, *Grutter*, and *Gratz*, the Court held, “the school districts must demonstrate that the use of individual racial classifications in the assignment plans here under review is ‘narrowly tailored’ to achieve a ‘compelling’ government interest.”<sup>152</sup> The Court simply accepted the standard as well-established, reflecting a color-blind interpretation of the Constitution.<sup>153</sup> Justice Roberts made his opinion clear, stating “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>154</sup>

Justice Thomas, endorsing a strict scrutiny analysis, repeatedly criticized Justice Breyer’s approval of race-conscious assignment policies because such policies undermine the requirements of a color-blind Constitution.<sup>155</sup> Likewise, Justice Kennedy saw no need to defend the strict scrutiny standard, merely stating, “[t]hese plans classify individuals by race and allocate benefits and burdens on that basis; and as a result, they are to be subjected to strict scrutiny.”<sup>156</sup> However, Justice Breyer’s dissent explicitly denied that “*Adarand*, *Gratz*, and *Grutter*, or any other—has ever held that the test of ‘strict scrutiny’ means that all racial classifications—no matter whether they seek to include or exclude—must in practice be treated the same.”<sup>157</sup>

Instead, Justice Breyer proposed a “contextual approach” to scrutiny.<sup>158</sup> Justice Breyer cited *Grutter* for the proposition that “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause.”<sup>159</sup> He reasoned that the Court should not treat dissimilar race-based decisions as though they were equally objectionable because the context at issue in *Parents Involved* aims to increase diversity, does not stigmatize or exclude, and does not impose burdens

<sup>151</sup> See *id.* at 2751 (plurality opinion).

<sup>152</sup> See *id.* at 2752; *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *Adarand*, 515 U.S. at 227.

<sup>153</sup> *Parents Involved*, 127 S. Ct. at 2751, 2767–68.

<sup>154</sup> See *id.* at 2768.

<sup>155</sup> See *id.* at 2768; *id.* at 2782, 2787–88 (Thomas, J., concurring) (“Most of the dissent’s criticisms of today’s result can be traced to its rejection of the color-blind Constitution.”).

<sup>156</sup> *Id.* at 2789 (Kennedy, J., concurring).

<sup>157</sup> *Id.* at 2817 (Breyer, J., dissenting).

<sup>158</sup> See *Parents Involved*, 127 S. Ct. at 2819 (Breyer, J., dissenting). Justice Stevens, also in dissent, faulted the plurality’s strict scrutiny standard and asserted that “a rigid adherence to tiers of scrutiny obscures *Brown*’s clear message.” See *id.* at 2799 (Stevens, J., dissenting).

<sup>159</sup> See *id.* at 2818 (Breyer, J., dissenting) (quoting *Grutter*, 539 U.S. at 327 (2003)).

unfairly upon members of one race.<sup>160</sup> Race-conscious assignment programs can be distinguished from the other contexts where one or more of these negative features were present.<sup>161</sup>

Justice Breyer agreed that race-conscious programs need to be examined carefully, but that “the law requires application here of a standard of review that is not ‘strict’ in the traditional sense of that word.”<sup>162</sup> By failing to consider context, he reasoned, the plurality misinterpreted the Court’s jurisprudence on the issue and transformed “the ‘strict scrutiny’ test into a rule that is fatal in fact across the board.”<sup>163</sup>

### III. THE COURT ERRED IN APPLYING STRICT SCRUTINY

#### A. *The Legislative History of the Fourteenth Amendment Does Not Support Application of Strict Scrutiny*

Application of strict scrutiny in the context of race-conscious assignment policies is inconsistent with the legislative history of the Fourteenth Amendment.<sup>164</sup> Although the Fourteenth Amendment is consistently heralded as “the cornerstone of color-blind constitutionalism,” its origins show that it is far from color-blind.<sup>165</sup> Despite Chief Justice Roberts’s contemporary argument that “[t]he 14th Amendment prevents states from according differential treatment to American children on the basis of color or race,” the Reconstruction Congress passed the Fourteenth Amendment with the specific intent of aiding Blacks and creating equality.<sup>166</sup> Holding that the Constitution is color-blind and

<sup>160</sup> See *id.*

<sup>161</sup> See *id.* at 2818 (citing as examples of negative features of race-conscious programs *Gratz*, 539 U.S. at 244; *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1977), *Brown v. Bd. of Educ.* (*Brown I*), 347 U.S. 294, 483 (1954)).

<sup>162</sup> See *id.* at 2819.

<sup>163</sup> See *Parents Involved*, 127 S. Ct. at 2817–18.

<sup>164</sup> See U.S. CONST. amend. XIV, § 1; *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2815 (2007) (Breyer, J., dissenting).

<sup>165</sup> See U.S. CONST. amend. XIV, § 1; *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (holding that a West Virginia statute “discriminating in the selection of jurors . . . against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man”); James D. Anderson, *Race-Conscious Educational Policies Versus a “Color-Blind Constitution”*: A Historical Perspective, 36 EDUC. RESEARCHER 249, 254 (2007).

<sup>166</sup> See U.S. CONST. amend. XIV, § 1; *Parents Involved*, 127 S. Ct. at 2767 (plurality opinion) (internal quotations omitted); Brief for Historians as Amici Curiae in Support of Respondents at 5–6, 17–19, *Parents Involved*, 127 S. Ct. 2738 (2007) (No. 05–908) [hereinafter

applying strict scrutiny to race-conscious student assignment policies, the *Parents Involved* Court incorrectly ignored the historical context in which the Fourteenth Amendment was enacted.<sup>167</sup>

The Fourteenth Amendment was enacted primarily for the protection of Blacks.<sup>168</sup> The Reconstruction Congress intended to incorporate “blacks into the civic, economic, and political mainstream in American society,” not to prohibit race-conscious measures adopted to further that end.<sup>169</sup> At the time, only state actions that discriminated against Blacks would come within the Amendment’s purview.<sup>170</sup>

The historical context in which the Amendment was enacted reveals the “true spirit and meaning of the amendments.”<sup>171</sup> The Reconstruction Congress diligently sought to enact race-conscious legislation in pursuit of equality.<sup>172</sup> In the years immediately preceding the ratification of the Fourteenth Amendment, Congress enacted the Civil Rights Act of 1866 and the Freedmen’s Bureau Act, race-conscious legislation for the benefit of Blacks.<sup>173</sup> In enacting this legislation, Congress specifically sought to aid the integration of Blacks into white society.<sup>174</sup>

Congressman Bingham, who would later author the Equal Protection Clause of the Fourteenth Amendment, did not object to the racial distinctions in the Freedmen’s Bureau Act.<sup>175</sup> Objectors argued that the

Brief for Historians]; Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985).

<sup>167</sup> See U.S. CONST. amend. XIV, § 1; Brief for Historians, *supra* note 166, at 5–6; Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 280 (1997).

<sup>168</sup> See U.S. CONST. amend. XIV, § 1; *Strauder*, 100 U.S. at 307, 310.

<sup>169</sup> See Brief for Historians, *supra* note 166, at 2; Mark Strasser, *The Invidiousness of Invidiousness: On the Supreme Court’s Affirmative Action Jurisprudence*, 21 HASTINGS CONST. L.Q. 323, 338 (1994).

<sup>170</sup> See U.S. CONST. amend. XIV, § 1; *Strauder*, 100 U.S. at 307.

<sup>171</sup> See *Strauder*, 100 U.S. at 306.

<sup>172</sup> See Brief for Historians, *supra* note 166, at 2, 21; see, e.g., Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Act of Dec. 5, 1865, ch. 90, 13 Stat. 507.

<sup>173</sup> See U.S. CONST. amend. XIV, § 1; Brief for Historians, *supra* note 166, at 21, 22, 23. “[T]he Civil Rights Act of 1866 itself contained facially race-conscious provisions to guarantee enforcement of civil rights for blacks.” Brief for Historians, *supra* note 166, at 23; Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

<sup>174</sup> Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Freedmen’s Bureau Act of July 16, 1866, ch. 200, 14 Stat. 173; Strasser, *supra* note 169, at 338.

<sup>175</sup> U.S. CONST. amend. XIV, § 1; Freedmen’s Bureau Act of July 16, 1866, ch. 200, 14 Stat. 173; Saunders, *supra* note 167, at 279; Schnapper, *supra* note 166, at 777. In considering the Fourteenth Amendment, the Joint Committee on Reconstruction rejected a proposed amendment providing that “[a]ll laws, state or national, shall operate impartially

bill only benefited Blacks to the detriment of whites, but proponents of the bill emphasized that the distinctions were entirely proper.<sup>176</sup> The Freedmen's Bureau was formed both to assist Blacks in bettering their own position and to provide relief, but not to discriminate unfairly.<sup>177</sup>

Congress believed this legislation to be so important that after President Andrew Johnson's first veto, it passed a new version of the bill that contained four additional race-conscious provisions.<sup>178</sup> Although again vetoed by the President, the House and the Senate voted to override, creating the Freedmen's Bureau.<sup>179</sup> That the Acts were passed despite explicit objections to the enactment of legislation specifically drafted for the benefit of Blacks provides even greater support for the proposition that the Fourteenth Amendment was never intended to be color-blind.<sup>180</sup>

Meanwhile, the President had also vetoed the Civil Rights Act of 1866.<sup>181</sup> President Johnson believed that the Act provided for Blacks at the expense of white citizens.<sup>182</sup> Nevertheless, Congress voted to override the President's veto, enacting the Civil Rights Act of 1866.<sup>183</sup>

The history and debate surrounding the enactment of this legislation provide strong evidence that Congress "could not have intended [the Fourteenth Amendment] generally to prohibit affirmative action for blacks or other disadvantaged groups."<sup>184</sup> Numerous history scholars believe Congress passed the Fourteenth Amendment to "ensure the

and equally on all persons without regard to race or color." See Saunders, *supra* note 167, at 276. Also, by a vote of seven to thirty-eight, the following amendment was rejected: "That no State . . . shall, by any constitution, law, or other regulation whatever . . . make or enforce in any way, or in any manner recognize any distinction between citizens . . . on account of race or color or previous condition of slavery." Saunders, *supra* note 167, at 276 n.135.

<sup>176</sup> See Freedmen's Bureau Act of July 16, 1866, ch. 200, 14 Stat. 173; Schnapper, *supra* note 166, at 756, 764, 766, 767, 774.

<sup>177</sup> Freedmen's Bureau Act of July 16, 1866, ch. 200, 14 Stat. 173; see Schnapper, *supra* note 166, at 768.

<sup>178</sup> See Schnapper, *supra* note 166, at 769, 771-72.

<sup>179</sup> See Freedmen's Bureau Act of July 16, 1866, ch. 200, 14 Stat. 173; Cong. Globe, 39th Cong., 1st Sess. 1287, 3842, 3850 (1866); Schnapper, *supra* note 166, at 775.

<sup>180</sup> See Freedmen's Bureau Act of July 16, 1866, ch. 200, 14 Stat. 173, Schnapper, *supra* note 166, at 756, 764, 766, 767, 774.

<sup>181</sup> See Civil Rights Act of 1866, ch. 31, 14 Stat. 27; 8 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3610-11 (1914); Schnapper, *supra* note 166, at 771.

<sup>182</sup> See Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Schnapper, *supra* note 166, at 771.

<sup>183</sup> See Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Schnapper, *supra* note 166, at 771.

<sup>184</sup> Schnapper, *supra* note 166, at 754.; see U.S. CONST. amend. XIV, § 1.

constitutionality of these two statutes and to write them into the fabric of the Constitution.”<sup>185</sup> It would be incongruous to conclude that Congress would adopt such remedial legislation—the Freedmen’s Bureau Act and the Civil Rights Act of 1866—while simultaneously enacting a color-blind Amendment.<sup>186</sup>

Another concern of the Reconstruction Congress was public education.<sup>187</sup> Contrary to the plurality’s recent holding in *Parents Involved*, the Fourteenth Amendment, as originally intended, did not bar states and localities from engaging in voluntary integration efforts.<sup>188</sup> Many members of Congress actually supported race-conscious school policies in several states within a year of enacting the Fourteenth Amendment.<sup>189</sup> In total, the Freedman’s Bureau was involved in the establishment or support of 4300 schools of all levels.<sup>190</sup>

From 1868 to 1887, while states were enacting race-conscious legislation to pursue integration, there were no constitutional challenges.<sup>191</sup> As a time when the level of federal monitoring of state action was extremely high, Congress was aware of the states’ use of race-conscious criteria and did not take any action that would express con-

<sup>185</sup> Brief for Historians, *supra* note 166, at 18; see U.S. CONST. amend. XIV, § 1; Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Freedmen’s Bureau Act of July 16, 1866, ch. 200, 14 Stat. 173.

<sup>186</sup> See Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Freedmen’s Bureau Act of July 16, 1866, ch. 200, 14 Stat. 173; Schnapper, *supra* note 166, at 789, 791.

<sup>187</sup> See David Tyack & Robert Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South*, 94 AM. J. OF EDUC. 236, 237 (1986).

<sup>188</sup> See U.S. CONST. amend. XIV, § 1; *Parents Involved*, 127 S. Ct. at 2746 (plurality opinion); Brief for Historians, *supra* note 166, at 6.

<sup>189</sup> See U.S. CONST. amend. XIV, § 1; Brief for Historians, *supra* note 166, at 6; Brief for Historians of the Civil Rights Era William H. Chafe et al. as Amici Curiae Supporting Respondents at 7, *Parents Involved*, 127 S. Ct. 2738 (2007) (No. 05–908) [hereinafter Brief for Historians of the Civil Rights Era].

<sup>190</sup> See Brief for Historians of the Civil Rights Era, *supra* note 189, at 7. For example, Congress incorporated and funded Howard University and Berea College, both utilizing policies focused on desegregation. See Brief for Historians, *supra* note 166, at 12. Although the final version of the Civil Rights Act of 1875 did not include a mandatory school integration provision, as advocated by some members of Congress, several states took note of the congressional support and passed legislation integrating their schools. See Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Brief for Historians, *supra* note 166, at 8, 11. From 1866 to 1887 Rhode Island, Michigan, Connecticut, New York, Nevada, Illinois, California, Pennsylvania, New Jersey, Louisiana, South Carolina, and Ohio adopted legislation to integrate schools. See *id.* at 8, 11.

<sup>191</sup> See *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879); Brief for Historians, *supra* note 166, at 12.



cern.<sup>192</sup> Thus, Congress impliedly affirmed the states' use of racial considerations in pursuing the goal of integration.<sup>193</sup>

In his *Parents Involved* dissent, Justice Breyer recognized this original understanding: the legal principle "that the government may voluntarily adopt race-conscious measures to improve conditions of race even when it is not under a constitutional obligation to do so" is predicated upon this "well-established legal view of the Fourteenth Amendment."<sup>194</sup> He acknowledged that the Equal Protection Clause does not require that minorities and non-minorities be treated the same when remedying distinct disadvantages.<sup>195</sup> And the Fourteenth Amendment does not require that the two be treated differently in pursuit of equality.<sup>196</sup> Through its application of strict scrutiny, and its effectual per se proscription to race-conscious measures, the Court has undermined the fundamental remedial objectives of the Fourteenth Amendment.<sup>197</sup> Application of strict scrutiny to race-conscious student assignment plans is at odds with the legislative intent of the Reconstruction Congress.<sup>198</sup>

#### B. *Desegregation and Affirmative Action Are Distinct and Separate Categories*

The Court's desegregation jurisprudence affirms the consideration of race in desegregating public schools.<sup>199</sup> Since race-conscious

<sup>192</sup> Brief for Historians, *supra* note 166, at 12.

<sup>193</sup> *See id.*

<sup>194</sup> *See Parents Involved*, 127 S. Ct. at 2814, 2815 (Breyer, J., dissenting) (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1970)).

<sup>195</sup> U.S. CONST. amend. XIV, § 1; *see* Brent E. Simmons, *Reconsidering Strict Scrutiny of Affirmative Action*, 2 MICH. J. RACE & L. 51, 72 (1996).

<sup>196</sup> *See* U.S. CONST. amend. XIV § 1; Simmons, *supra* note 195, at 72.

<sup>197</sup> *See Parents Involved*, 127 S. Ct. at 2815, 2817–18 (Breyer, J., dissenting); Simmons, *supra* note 195, at 82.

<sup>198</sup> *See Parents Involved*, 127 S. Ct. at 2815 (Breyer, J., dissenting); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1195 (9th Cir. 2005) (Kozinski, C.J., concurring); Schnapper, *supra* note 166, at 789, 791.

<sup>199</sup> *See, e.g., N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43, 46 (1971) ("Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."); *Swann*, 402 U.S. at 16 ("School authorities . . . might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole."); *see also Parents Involved*, 127 S. Ct. at 2811–12, 2817–18, 2834–35 (Breyer, J., dissenting); Brief for the NAACP Legal Defense & Education Fund, Inc. as Amicus Curiae in Support of Respondents at 9, 10, *Parents Involved*, 127 S. Ct. 2738 (2007) (No. 05–908) [hereinafter Brief for NAACP].

assignment policies are extensions of desegregation policies and distinguishable from affirmative action programs, the Court erred in applying the strict scrutiny standard from affirmative action jurisprudence.<sup>200</sup> Constitutional challenges to desegregation policies and affirmative action programs are based on the Equal Protection Clause of the Fourteenth Amendment.<sup>201</sup> Despite this commonality, the Court has appropriately analyzed desegregation cases differently from cases of affirmative action.<sup>202</sup> The harms associated with merit-based selection processes in affirmative action cases, used to justify the use of strict scrutiny, are not present in cases of desegregation or race-conscious student assignment policies.<sup>203</sup> Therefore, race-conscious student assignment policies should be analyzed consistently with desegregation case precedent.<sup>204</sup>

<sup>200</sup> See *Parents Involved*, 127 S. Ct. at 2809, 2817, 2818, 2831–32 (Breyer, J., dissenting); Brief for Historians of the Civil Rights Era, *supra* note 189, at 21, 22; Archer, *supra* note 52, at 647–48.

<sup>201</sup> See U.S. CONST. amend. XIV, § 1; Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 How. L.J. 1, 83 (1995); see, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 476–77 (1989); *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 (1954).

<sup>202</sup> Compare *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971) (“The Clarke County Board of Education, as part of its affirmative duty to disestablish the dual school system, properly took into account the race of its elementary school children in drawing attendance lines.”), with *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995) (“[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”); see also *Parents Involved*, 127 S. Ct. at 2817–18 (Breyer, J., dissenting); Brief for NAACP, *supra* note 199, at 5–6; Archer, *supra* note 52, at 639; Goodwin Liu, *Seattle and Louisville*, 95 CAL. L. REV. 277, 311 (2007).

<sup>203</sup> See *Parents Involved*, 127 S. Ct. at 2818–19 (Breyer, J., dissenting); Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1, 20–22 (2000). Rubin identifies five harms that may accompany the use of racial classifications of historically disadvantaged groups; (1) the risk that racial classification is intended to harm an unpopular group and are employed for “no reason other than racial hostility”; (2) risk that race is used to “reward the members of (at least ordinarily) one’s own racial group,” leaving members of the “out group” to feel they are less than full members of the polity; (3) risk that race “is being used for reasons that reflect nothing more than erroneous stereotypes”; (4) risk that the use of race “may perpetuate a negative racial stereotype”; (5) risk that decisions based on race may “deny a person treatment as an individual in a way that other sorting mechanisms do not.” Rubin, *supra*, at 20–22. Opponents of affirmative action criticize such programs because they allocate resources to minorities and harm “innocent whites” by replacing the concept of merit with quotas. Spann, *supra* note 201, at 12.

<sup>204</sup> See *Parents Involved*, 127 S. Ct. at 2811–12, 2817–18 (Breyer, J., dissenting); *McDaniel*, 402 U.S. at 41; Archer, *supra* note 53, at 639; Kevin G. Welner, *K–12 Race-Conscious Student Assignment Policies: Law, Social Science, and Diversity*, 76 REV. EDUC. RES. 349, 366–69 (2006).

However, in analyzing the race-conscious assignment policies in *Parents Involved*, Chief Justice Roberts cited prior affirmative action cases for the proposition that all racial classifications are subject to strict scrutiny.<sup>205</sup> Despite stressing that “[c]ontext matters” when analyzing racial classifications under the Equal Protection Clause, the *Parents Involved* Court ignored the distinction between desegregation and affirmative action in race-conscious policy precedent.<sup>206</sup> By disregarding this distinction and applying strict scrutiny to the race-conscious assignment policies in *Parents Involved*, the Court inappropriately conflated two distinct lines of cases: desegregation cases and affirmative action cases.<sup>207</sup>

### 1. Prior to *Parents Involved*, Desegregation Cases Have Never Been Analyzed with Strict Scrutiny

The Court has never applied strict scrutiny in the context of school desegregation.<sup>208</sup> The unanimous *Brown* Court did not apply “rigid scrutiny” in analyzing the constitutionality of the segregation policy, despite the Court’s previous declaration in *Korematsu v. United States* that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect” and are subject to “the most rigid scrutiny.”<sup>209</sup> From the landmark desegregation case of *Brown* to *Missouri v. Jenkins*, the Court never referenced, implied, or held that strict scrutiny would be the appropriate standard of review in desegregation cases.<sup>210</sup>

Before *Parents Involved*, the Court’s history of applying strict scrutiny to racial classifications in educational policies had been appropri-

<sup>205</sup> See *Parents Involved*, 127 S. Ct. at 2751–52 (plurality opinion) (citing *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003), *Adarand*, 515 U.S. at 227, *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980)).

<sup>206</sup> See *id.* at 2754 (plurality opinion) (quoting *Grutter*, 539 U.S. at 327); *id.* at 2817–18 (Breyer, J., dissenting) (quoting *Grutter*, 539 U.S. at 327).

<sup>207</sup> See *id.* at 2761–65 (plurality opinion); *id.* at 2817–18 (Breyer, J., dissenting); Brief for NAACP, *supra* note 199, at 5–6; Archer, *supra* note 52, at 648, 650; see, e.g., *Adarand*, 515 U.S. at 227; *Brown I*, 347 U.S. at 495.

<sup>208</sup> See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 89 (1995) (relying on good faith to determine whether school had complied with desegregation order); *Swann*, 402 U.S. at 16 (recognizing broad discretionary powers of schools to implement race-conscious desegregation policies); see also *Parents Involved*, 127 S. Ct. at 2816–17 (Breyer, J., dissenting); Brief for NAACP, *supra* note 199, at 5–6; Archer, *supra* note 52, at 648.

<sup>209</sup> See *Brown I*, 347 U.S. at 495; *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (upholding government policy that required the internment of Japanese-Americans).

<sup>210</sup> See generally *Jenkins*, 515 U.S. at 73; *McDaniel*, 402 U.S. at 40; *Brown I*, 347 U.S. at 486.

ately confined to affirmative action cases.<sup>211</sup> The affirmative action cases “dealt not with the constitutional viability of integrative, race-conscious public school student assignments, but instead with policies and programs that considered race among other factors in the distribution of what the Court deemed to be legally cognizable burdens and benefits.”<sup>212</sup>

Affirmative action policies were initially introduced in the context of employment, requiring government contractors to take affirmative action to eliminate the use of race considerations in hiring decisions.<sup>213</sup> Such affirmative action programs are criticized because they “can foster a sense that, without help, its beneficiaries are unable to compete.”<sup>214</sup> This is because these selection processes involve the distribution of a limited resource.<sup>215</sup> In distributing those resources, the institutions engage in a merit-based competition.<sup>216</sup> Because selection is merit-based,

<sup>211</sup> See, e.g., *Grutter*, 539 U.S. at 311, 326 (applying strict scrutiny to law school admissions policy); *Adarand*, 515 U.S. at 205–10, 227 (applying strict scrutiny to affirmative action employment program); *J.A. Croson Co.*, 488 U.S. at 477–83, 493 (applying strict scrutiny to affirmative action employment program); see also *Parents Involved*, 127 S. Ct. at 2816–17 (Breyer, J., dissenting); Brief for NAACP, *supra* note 199, at 5–6; Archer, *supra* note 52, at 639, 648, 650.

<sup>212</sup> See Archer, *supra* note 52, at 639; see, e.g., *Adarand*, 515 U.S. at 205 (describing the contract terms that provide additional compensation to contractors who hired small businesses operated by “socially or economically disadvantaged individuals”); *J.A. Croson Co.*, 488 U.S. at 477 (describing the Minority Business Utilization Plan that “required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises”).

<sup>213</sup> See SAMUEL LEITER & WILLIAM M. LEITER, *AFFIRMATIVE ACTION IN ANTIDISCRIMINATION LAW AND POLICY: AN OVERVIEW AND SYNTHESIS* 40 (2002); Archer, *supra* note 52, at 646–47. President John F. Kennedy issued Executive Order 10,925 in March 1964, requiring federal contractors to stop discrimination and “take affirmative action to ensure that applicants are employed and that employees are treated . . . without regard to their race, creed, color, or national origin.” See Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961). President Lyndon B. Johnson extended the requirement of affirmative action to all federal employment following the enactment of the Civil Rights Act of 1964. See Civil Rights Act of 1964, 42 U.S.C. § 2000d (1964); Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965); West, *supra* note 89, at 613. Executive Order 11,246 required “equal opportunity in Federal employment for all qualified persons” and “prohibit[ed] discrimination in employment because of race, creed, color, or national origin . . .” Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).

<sup>214</sup> See Rubin, *supra* note 203, at 33.

<sup>215</sup> See Archer, *supra* note 52, at 639; Welner, *supra* note 204, at 366–67.

<sup>216</sup> See Archer, *supra* note 52, at 653; Liu, *supra* note 202, at 300; Welner, *supra* note 204, at 366–67. This competition is a zero-sum game: an applicant is either admitted or rejected. See Archer, *supra* note 52, at 652; Welner, *supra* note 204, at 366–67. In this context,

rejection carries a stigma.<sup>217</sup> That stigma may burden white and minority students alike.<sup>218</sup> It is the possibility of this stigma resulting from selection (or non-selection) that triggers strict scrutiny analysis in affirmative action cases.<sup>219</sup>

Although *Gratz*, *Grutter*, and *Bakke* all dealt with race-conscious policies in education, they are not desegregation cases; they are clear affirmative action cases.<sup>220</sup> Selection into a college, university, or graduate program is a merit-based decision.<sup>221</sup> Just as an employer has limited hiring needs, a university only has a limited enrollment; therefore, the number of available spots is a limited resource.<sup>222</sup> The Massachusetts District Court recognized this difference when it upheld a student race-conscious assignment policy in *Comfort v. Lynn School Committee*.<sup>223</sup> Even though the K–12 schools throughout the district offered varying academic programs, the education at each school for any given level was comparable.<sup>224</sup> However,

this is not a case, as in *Adarand*, *Bakke*, or *Grutter*, in which the [school district], in the distribution of limited resources, gives preference to some persons on the basis of race. Students like the plaintiffs may not be able to attend the specific school

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there is an outright denial of opportunity to some applicants. See *Archer*, *supra* note 52, at 652; *Welner*, *supra* note 204, at 366–67.

<sup>217</sup> See *Liu*, *supra* note 202, at 300; *Welner*, *supra* note 204, at 366–67.

<sup>218</sup> See *Rubin*, *supra* note 203, at 38, 39; *Spann*, *supra* note 201, at 311; *Welner*, *supra* note 204, at 366.

<sup>219</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1194 (9th Cir. 2005); *Welner*, *supra* note 204, at 366–67.

<sup>220</sup> See *Parents Involved*, 127 S. Ct. at 2817, 2818–19 (Breyer, J., dissenting); *Grutter v. Bollinger*, 539 U.S. 306, 311, 314–17, 329 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 249–50, 256 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 274–75 (1977); *SPANN*, *supra* note 52, at 3.

<sup>221</sup> See *Archer*, *supra* note 52, at 653; *Welner*, *supra* note 204, at 367.

<sup>222</sup> See *Archer*, *supra* note 52, at 652.

<sup>223</sup> See *Comfort v. Lynn Sch. Comm.*, 263 F. Supp. 2d 209, 215 (D. Mass. 2003). The district court distinguished *Adarand*'s affirmative action program, where "the Court subjected a racial classification to strict scrutiny," from Lynn's race-conscious assignment policies, where race is merely considered but "no preference is given to members of one race over another." See *id.* at 244–45 (citing *Adarand* 515 U.S. at 204). The district court further noted that other courts have similarly held that "where differential treatment does not favor members of one race over another, there is no racial classification, *Adarand* is inapposite, and strict scrutiny does not apply." See *id.* at 244.

<sup>224</sup> See *id.* at 245.

they want, but no student is advantaged over another on the basis of race.<sup>225</sup>

In contrast, primary and secondary public education is not a limited resource distributed on the basis of merit.<sup>226</sup> Because attendance is compulsory for all K–12 students, school assignment is fundamentally a sorting process.<sup>227</sup> As a sorting process, assignment decisions “do not reflect judgments about the merit, qualifications, or talents of individual children.”<sup>228</sup> When viewed in this manner, “there is no risk, as there is in the context of affirmative action, that a government body taking account of race is acting on the basis of a belief that blacks are less able than whites or inherently in need of assistance.”<sup>229</sup> So, while a student may not be assigned to his or her first choice K–12 school, assignment to a second or third choice school does not carry the same stigma as rejection from a position awarded on the basis of merit.<sup>230</sup>

One instructive comparison for this race-conscious sorting process is electoral redistricting.<sup>231</sup> While districting policies are not completely analogous to parental choice plans, both are essentially non-merit based sorting processes.<sup>232</sup> As such, there is no stigma attached to selection or non-selection in either context.<sup>233</sup> In cases of electoral redistricting, strict scrutiny is not applied unless “race was the predominant factor motivating the legislature’s decision.”<sup>234</sup> Despite the command of *Adarand* that all racial classifications automatically be analyzed under strict scrutiny, the sorting process of electoral redistricting proves that

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<sup>225</sup> See *id.*

<sup>226</sup> See *Parents Involved*, 127 S. Ct. at 2918–19 (Breyer, J., dissenting); *Parents Involved*, 426 F.3d at 1181; *Comfort*, 263 F. Supp. 2d at 245; Brief for Respondents at 5, *Meredith v. Jefferson County Bd. of Educ.*, No. 05–915 (2007); Welner, *supra* note 204, at 366–67.

<sup>227</sup> See Liu, *supra* note 202, at 301; Welner, *supra* note 204, at 366–67.

<sup>228</sup> See Liu, *supra* note 202, at 300.

<sup>229</sup> See Rubin, *supra* note 203, at 39.

<sup>230</sup> See *Parents Involved*, 127 S. Ct. at 2818 (Breyer, J., dissenting); *Parents Involved*, 426 F.3d at 1194; Rubin, *supra* note 203, at 39.

<sup>231</sup> See Liu, *supra* note 202, at 301.

<sup>232</sup> See *id.*

<sup>233</sup> See Rubin, *supra* note 203, at 38.

<sup>234</sup> See *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

this is not the case.<sup>235</sup> Similarly, the sorting policies at issue in *Parents Involved* should not have been subject to strict scrutiny.<sup>236</sup>

## 2. Deference: Desegregation Jurisprudence

In desegregation cases the Court has shown great deference to local school authorities and has emphasized the discretionary authority of local school boards in matters of educational policy setting.<sup>237</sup> These cases have stood for the principle that schools can adopt voluntary race-conscious policies to remedy *de facto* discrimination.<sup>238</sup> The Court's current "strict in theory, but fatal in fact" approach, used to invalidate voluntary race-conscious assignment policies in K-12 schools, is inconsistent with "[a] longstanding and unbroken line of legal authority" endorsing this principle.<sup>239</sup>

In support, Justice Breyer cited the Court's continued deference to the authority of local school boards dating back to *Brown*.<sup>240</sup> The Court has repeatedly recognized the broad authority of local schools in formulating and implementing educational policies.<sup>241</sup> It has long been observed that "local autonomy of school districts is a vital national tradition."<sup>242</sup>

In *Swann*, the Court held that district courts were authorized to mandate desegregation policies, but that their authority was limited to situations where schools had first failed to meet their obligation to

<sup>235</sup> See *Adarand*, 515 U.S. at 227; *Archer*, *supra* note 52, at 655; *Liu*, *supra* note 202, at 303; see, e.g., *Miller*, 515 U.S. at 916.

<sup>236</sup> See *Parents Involved*, 127 S. Ct. at 2818-19 (Breyer, J., dissenting); *Parents Involved*, 426 F.3d at 1181; *Comfort*, 263 F. Supp. 2d at 245; Brief for Respondents at 5, *Meredith v. Jefferson County Bd. of Educ.*, No. 05-915 (2007); *Welner*, *supra* note 204, at 366-67.

<sup>237</sup> See, e.g., *Freeman v. Pitts*, 503 U.S. 467, 490 (1992); *Bd. of Educ. v. Dowell*, 489 U.S. 237, 248 (1990); *Swann*, 402 U.S. at 16; see also *Parents Involved*, 127 S. Ct. at 2801, 2811-12 (Breyer, J., dissenting).

<sup>238</sup> See *N.C. Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) ("[S]chool authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements."); see also *Parents Involved*, 127 S. Ct. at 2811-12, 2814, 2836 (Breyer, J., dissenting).

<sup>239</sup> See *Parents Involved*, 127 S. Ct. at 2811, 2817 (Breyer, J., dissenting).

<sup>240</sup> See *id.* at 2811-15, 2836; *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 299 (1955) ("School authorities have the primary responsibility for elucidating, assessing, and solving these [violations of the Equal Protection Clause] problems.").

<sup>241</sup> See *Swann*, 402 U.S. at 16; *N.C. Bd. of Educ.*, 402 U.S. at 45.

<sup>242</sup> See *Freeman*, 503 U.S. at 490 (citing *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977)).

desegregate.<sup>243</sup> Even after lower courts found that the board had failed to meet its obligation, the board was still able to choose which of three policies to adopt, or to come forward with a new plan of its own.<sup>244</sup> This principle has been accepted by lower courts and the federal government.<sup>245</sup> The Court emphasized that “[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of educational process.”<sup>246</sup>

The “resegregation” cases beginning in the 1990s relied upon this principle in lifting desegregation orders, despite findings of *de facto* desegregation.<sup>247</sup> Because of the value placed upon local control of educational decisions, the Court intended not only “to remedy the violation” of the Equal Protection Clause but also “to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.”<sup>248</sup> Releasing school districts from portions of desegregation decrees, but not others, the Court stated that “[p]artial relinquishment of judicial control . . . can be an important and significant step in fulfilling the district court’s duty to return the operations and control of schools to local authorities.”<sup>249</sup>

Moreover, recognizing the authority of local school boards, the Court has previously encouraged, not condemned, voluntary action to remedy both *de jure* and *de facto* discrimination.<sup>250</sup> Although a federal

<sup>243</sup> See *Swann*, 402 U.S. at 15.

<sup>244</sup> See *id.* at 11.

<sup>245</sup> See *Parents Involved*, 127 S. Ct. at 2811–12, 2813–14, 2816 (Breyer, J., dissenting); *Swann*, 402 U.S. at 16; Brief for NAACP, *supra* note 199, at 10.

<sup>246</sup> *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1973) (emphasizing that the District Court could not force local school district A into a mandatory busing program with a neighboring school district B which had engaged in *de jure* segregation, where that school district A had not engaged in such activity).

<sup>247</sup> See, e.g., *Jenkins*, 515 U.S. at 102; *Freeman*, 503 U.S. 489–90; *Dowell*, 498 U.S. at 248.

<sup>248</sup> See *Jenkins*, 515 U.S. at 102 (quoting *Freeman*, 503 U.S. at 489).

<sup>249</sup> See *Freeman*, 503 U.S. at 489.

<sup>250</sup> See *Parents Involved*, 127 S. Ct. at 2810–11, 2812 (Breyer, J., dissenting) (citing *McDaniel*, 402 U.S. at 41); *Archer*, *supra* note 52, at 644. Further defining the scope of the federal courts remedial powers, the Court has stated,

[t]hese specific educational remedies, although normally left to the discretion of the elected school board and professional educators, were deemed necessary to restore victims of discriminatory conduct to the position they would have enjoyed in terms of education had these four components been



court cannot intervene where a district has eliminated the vestiges of *de jure* segregation (while *de facto* segregation still exists), a school district is not so limited.<sup>251</sup> In *Keyes*, Justice Powell specifically stated that “[s]chool boards would, of course, be free to develop and initiate further plans to promote school desegregation” beyond what the court has ordered because “[n]othing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience.”<sup>252</sup> This statement makes clear that the Court did not intend to limit a local school district’s authority to remedy *de facto* segregation.<sup>253</sup>

Prior to *Parents Involved*, the Court had never addressed the constitutionality of voluntary race-conscious assignment policies in K–12; however, an illustrative case on this matter involved the same school district more than two decades earlier.<sup>254</sup> In *Washington v. Seattle School District No. 1*, the Court held that the Fourteenth Amendment could be used to defend a mandatory busing program from attack by the State.<sup>255</sup> The Seattle school board voluntarily adopted a busing program to reduce racial isolation in district schools.<sup>256</sup> In response, a community organization called Citizens for Voluntary Integration Committee (CiVIC) opposed the plan by drafting Initiative 350, enacted in 1978.<sup>257</sup> The Initiative’s sole purpose was to make illegal mandatory busing for purposes of integration.<sup>258</sup> The Court held Initiative 350 unconstitutional because it served to “[disadvantage] those who

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provided in a nondiscriminatory manner in a school system free from pervasive *de jure* racial segregation.

See *Milliken*, 433 U.S. at 282.

<sup>251</sup> See *Parents Involved*, 127 S. Ct. at 2810–11, 2812, 2814–15 (Breyer, J., dissenting); *Keyes v. Sch. Dist. No. 1*, 412 U.S. 189, 242 (1973) (Powell, J., concurring); Archer, *supra* note 52, at 644.

<sup>252</sup> See *Keyes*, 412 U.S. at 242 (Powell, J., concurring) (holding “where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action”).

<sup>253</sup> See *Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring); *id.* at 2811–15 (Breyer, J., dissenting); Brief for NAACP, *supra* note 199, at 9–11.

<sup>254</sup> See *Parents Involved*, 127 S. Ct. at 2746 (plurality opinion); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 459 (1982); Archer, *supra* note 52, at 636–37, 649.

<sup>255</sup> See *Washington*, 458 U.S. at 459, 487.

<sup>256</sup> See *id.* at 461. The school was not under a mandatory desegregation decree and the Court did not address whether the school had engaged in *de jure* segregation. See *id.* at 464 n.8.

<sup>257</sup> See *id.* at 461–63.

<sup>258</sup> *Id.* at 463.

would benefit from laws barring” *de facto* desegregation.<sup>259</sup> Moreover, the Initiative undermined the school board—“those who . . . would otherwise regulate student assignment decisions”—and it “[burdened] all future attempts to integrate Washington schools in districts throughout the State.”<sup>260</sup> The Court stated that “in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process.”<sup>261</sup>

Although the Court analyzed Initiative 350’s constitutionality, not that of the voluntary busing program, it noted that decisions about such programs were squarely within the authority of the local school boards.<sup>262</sup> This meant that Seattle could continue its voluntary race-conscious assignment policy, even though such a program could not have been ordered by a federal court.<sup>263</sup> Therefore, the Court implied that race-conscious policies adopted by a school board, even in the absence of *de jure* segregation, were permissible.<sup>264</sup>

*Washington* was decided just four years after *Bakke*, yet the Court made no mention of affirmative action, nor did it question the constitutionality of Seattle’s race-conscious assignment policy.<sup>265</sup> At no time when addressing issues of desegregation had the Court treated the issue as one of affirmative action.<sup>266</sup> By contradicting the principle that school officials have greater authority to foster racially integrated

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<sup>259</sup> See *id.* at 475.

<sup>260</sup> See *Washington*, 458 U.S. at 475, 483 (internal quotations omitted).

<sup>261</sup> See *id.* at 474.

<sup>262</sup> See *id.* at 479–80. The Court stated:

[b]efore adoption of the initiative, the power to determine what programs would most appropriately fill a school district’s educational needs—including programs involving student assignment and desegregation—was firmly committed to the local board’s discretion. The question whether to provide an integrated learning environment rather than a system of neighborhood schools surely involved a decision of that sort.

*Id.*

<sup>263</sup> See *Parents Involved*, 127 S. Ct. at 2830, 2831 (Breyer, J., dissenting); *Washington*, 458 U.S. at 459, 487; Brown, *supra* note 58, at 10.

<sup>264</sup> See *Parents Involved*, 127 S. Ct. at 2830, 2831 (Breyer, J., dissenting); *Washington*, 458 U.S. at 481–82, 487.

<sup>265</sup> See generally *Washington*, 458 U.S. 457; *Bakke*, 438 U.S. at 268.

<sup>266</sup> See, e.g., *Washington*, 458 U.S. at 487; see also Brief for NAACP, *supra* note 199, at 5.

student bodies than federal courts, the *Parents Involved* Court broke long-standing, clear precedent.<sup>267</sup>

### CONCLUSION

The *Parents Involved* Court had the opportunity to affirm the promise of *Brown v. Board of Education* and to provide to all students the opportunity to learn in a racially-diverse environment. Instead, the *Parents Involved* plurality took the harsh position that integration and racial diversity, and the benefits that flow from that diversity, cannot be pursued voluntarily by local school districts. In reaching this conclusion, the Court mistakenly applied the strict scrutiny standard of review.

Applying strict scrutiny conflicts with the original intent of the Fourteenth Amendment; application of a “fatal in fact” standard of analysis is inconsistent with the Equal Protection Clause. It unnecessarily and inappropriately conflated the Court’s affirmative action and desegregation jurisprudence by failing to account for the relevant differences between the K–12 sorting assignment policies and merit-based selection affirmative action programs. By applying strict scrutiny, the Court disregarded the context of K–12 schools and failed to give the proper deference, as compelled by precedent established in desegregation case law, to the authority of local school boards.

The Court’s ruling in *Parents Involved* has taken from schools “the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty.”<sup>268</sup> The *Parents Involved* plurality is best summarized by Justice Breyer in his dissent. Speaking of the plurality that held the policies unconstitutional, he wrote:

It misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm a disruptive round of race related litigation, and it undermines *Brown*’s promise of integrated primary and secondary education that local communities have sought to make a

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<sup>267</sup> *Parents Involved*, 127 S. Ct. at 2811, 2817–18 (Breyer, J., dissenting); Archer, *supra* note 52, at 644.

<sup>268</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2837 (2007) (Breyer, J., dissenting).

reality. This cannot be justified in the name of the Equal Protection Clause.<sup>269</sup>

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<sup>269</sup> *Id.* at 2800–01.

